Antitrust Damages Claims in Spain

Francisco Marcos*

Abuse of dominant position; Cartels; Competition law claims; Damages; EU law; Measure of damages; Private enforcement; Spain

Introduction

Administrative competition authorities (national and regional) have historically been the main enforcers of competition law in Spain,[1] but more recently private claims before judges have emerged and slowly grown as an alternative and complementary enforcement tool. This is shown by the upsurge in private litigation in the last five years in several cartel follow-on claims (paper envelopes, decennial insurance, car distribution and trucks' manufacturers). On the side, the adoption of specific provisions on antitrust damages claims will further clarify the legal settings for these actions in the future (Spanish law lacked any specific provision in this regard[2], until Directive 2014/104/UE was implemented[3]).

As is well known, public enforcement of competition law advances the public interest and it is aimed at declaring infringements of competition rules, punishing the unlawful behaviour, and eventually, at designing remedies to restore competition. Private enforcement of competition law pursues private interests and seeks that courts declare the infringement, order its cessation, void anticompetitive clauses in contracts or award compensatory damages.

Until now, Spanish courts have accommodated damages actions within the existing legal framework for tort claims and they have managed to build a relatively coherent legal doctrine on the specific issues raised by antitrust damages claims. After briefly describing the legal framework for deciding these suits, this article reviews the most relevant cases and extracts the lessons that can be learned from them.

Legal framework for antitrust damages actions

Conceptually, antitrust damages actions are tort claims,[4] Compensation is sought for harm resulting from anticompetitive unlawful behaviour. The basic rules and requirements regarding tort claims apply in antitrust damages claims as well. Plaintiffs need to show that any form of illicit conduct has caused them harm and also quantify the harm suffered. These three elements (illicit action, harm and causality) are common to all tort claims (art.1902 of Civil Code: "any person who by action or omission causes harm to another by fault or negligence is obliged to repair the damage caused").

Antitrust damages actions are facilitated where a prior infringement decision has been adopted by one of the competition authorities in charge of public enforcement of competition law ("follow-on"). The claim for compensation will be further eased where the infringement decision discloses detailed evidence on the particular conditions of the infringement and, eventually, on its effects. In many of these follow-on claims, the decision of the competition authority finding and punishing anticompetitive behaviour assists the victims to prove not only the unlawful conduct but also brings valuable information and data regarding the causation and quantification of the harm.

In absence of a prior decision from the public enforcer, the victims of anticompetitive conduct must prove all the elements on which the damage action is grounded ("stand-alone" claims).

Extended knowledge and experience of Spanish courts on tort litigation sets the basis for the recent advent of antitrust damages claims. Case law on other economic torts provides useful lessons to antitrust victims on both the proof and assessment of harm and causality.

Broadly speaking, harm caused by anticompetitive conduct can be conceived similar to the harm caused by any other economic offence; and Member States' national rules on causation and attribution of liability are useful for liability arising from anticompetitive behaviour. However, in the context of liability private damages for competition law infringements, case law of the EU Court of Justice has further developed principles on causation[5] and attribution of liability[6] that inform the courts of the Member States when ruling on private damages actions,[7]

* Francisco.marcos@ie.edu, Professor of Law, IE Law School (Spain). He serves as academic consultant in CCS Abogados, a law firm that is representing and defending plaintiffs in the trucks' manufacturers and milk procurement cartels damages' claims. Suggestions and comments by Professors Miguel S. Ferro and Barry J. Rodger and by Ainhoa Veiga are gratefully acknowledged, the remaining mistakes are my own.

[1] Spanish domestic competition rules were modernised by the Defence Competition Act of 2007 (hereinafter DCA) Act 15/7 of 3/7, Official Gazette 159 of 4 July 2007. The DCA prohibitions closely mirror arts 101 and 102 TFEU.

[2] The situation was different under DCA 1989 (Defence Competition Act 16/1989 of 17/7, Official Gazette 170 of 18 July 1989, only available in Spanish) and DCA 1963 (Official Gazette 173 of 23 July 1963, only available in Spanish), under which only follow-on actions were possible and only once there was a final decision by the Defence Competition Tribunal (arts 13.2 of DCA 1989 and 6 of DCA 1963).

[3] Decree-Law 9/17 of 26/5 (Official Gazette 126 of 27 May 2017), which introduced art.71.1 DCA affirming the general liability of infringers of EU or domestic competition law for harm caused by their actions (this includes the right to compensation for actual losses and lost profits, plus the payment of interest, art.72 DCA).

[4] This was, apparently, settled by the Supreme Court in its first decision on the follow-on claims in the sugar cartel, see judgment of 8 June 2012 *Galletas Guyón SA et al v ACOR, Sociedad cooperativa agropecuaria*, ES:TS:2012:5462 (legal ground 12), but theoretically there are solid arguments to consider it to be covered by contractual liability (in the event the claimant is party to the contract embodying the anticompetitive restraint).

[5] See Judgment of the Court (5th Chamber) of 12 December 2019, *Otis Gmbh v Land Oberösterreich* (C-435/18) EU:C:2019:1069; [2020] Bus. L.R. 37 at [22]–[27].

[6] See Judgment of the Court (2nd Chamber) of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy* (C-724/17) EU:C:2019:204; [2019] 4 C.M.L.R. 26 at [38]–[40], [46] and [51].

[7] See EUCJ judgments of 20 September 2001, *Courage v Crehan* (C-453/99) EU:C:2001:465; [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [29] and [31]); of 13 July 2006, *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) EU:C:2006:461; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [60]–[63]; of 14 June 2011, *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7; [2012] C.E.C. 50 at [28]–[29]; of 6 November 2012, *European Commission v*

Furthermore, as it also occurs in other types of unlawful conduct that generate liability, in case of cartels it can be deemed that some level of harm has automatically occurred (*ex re ipsa loquitur*); this presumption can, of course, be subject to rebuttal.

Although the existing case law on economic torts is useful, the courts' acquaintance with antitrust damages claims has been, until recently, rather limited.[8] Since the 1980s there has been a high number of claims regarding anticompetitive restraints in fuel distribution, but from the judgments issued on those cases it has been difficult to extract any principles or findings that could be extended to other cases. Apart from the "fuel retail antitrust" saga (See "Fuel retail" below), there has been only one leading case in which the Supreme Court confirmed a follow-on claim in relation to the sugar cartel (See "The leading case: industrial sugar cartel"). Although it is a single case—embodied in two judgments—some of the Supreme Court's legal grounds therein have proved to be valuable for Spanish lower courts in deciding antitrust damages claims filed after 2014.

The development of the nascent antitrust damages caselaw in Spain should be credited to the circa 60 specialised commercial judges and specialised sections in the high provincial courts (with also several specialist magistrates seating in the Supreme Court).[9] Territorial jurisdiction among the several commercial judges is allocated following the criteria set by the Spanish Civil Procedure Act.[10]

In addition, in terms of funding, the general rule for civil proceedings in Spain is that legal fees and litigation costs are paid by the losing party, unless the court finds that a case presents serious legal or factual complexities.[11] Conditional fee arrangements and contingency fees are allowed[12] and several litigation funds operate in Spain and have increasingly shown their interest in acquiring and funding antitrust damages claims.[13]

Antitrust damages claims arising after May 2017 are governed by the substantive rules adopted in implementation of Directive EU/2014/104.[14] Doubts exist concerning either their application to claims risen during the transposition period or that were pending when the Directive was implemented or, alternatively, the interpretation of traditional tort rules in conformity with the Directive to cases filed after the Directive entered into force but before it was implemented (with delay) by the Spanish legislator.[15]

Cases

In the past, most private actions for infringements of competition law have been "stand-alone" claims in commercial disputes concerning vertical restraints or abuses of dominance. These have generally been cases in which the infringement of competition law was used to seek the nullity of contracts or obligations and, occasionally, to claim compensation.[16]

More recently there has been an increase in "follow-on" claims subsequent to the Spanish competition authorities' uncovering and sanctioning a number of cartels. Most of these actions are still pending in court, at different stages of the procedure.

Vertical restraints

Quite a few private competition disputes before the courts have involved distribution of basic consumables (bread, beer), automobiles, journals/press, pharmaceuticals, farming equipment, and also franchising contracts; still, the largest number of actions have dealt with disputes in the fuel industry. Most of the claims refer to issues related to pricing or other terms in the distribution contract which could be deemed anticompetitive (e.g. exclusivity). Today, a substantial number of claims continue to be filed in connection with competition infringements in the fuel retail industry.

Fuel retail

These actions have been mostly brought by fuel stations (retailers) against the large oligopolistic suppliers (REPSOL, CEPSA, BP and GALP); in some cases, as a response to lawsuits brought by suppliers against retailers for breach of contract. Thus, retailers argue that their contractual relationships are null and unenforceable on competition grounds (because of the extended duration of the exclusivity contract or because there was indirect RPM).

Otis NV (C-199) EU:C:2012:684; [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750 at [41]–[43]); of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [23]; of 5 June 2014, *Kone AG v OBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [22]–[24] and *Vantaan kaupunki v Skanska Industrial Solutions Oy* (C-724/17) of 14 March 2019, *Skanska* EU:C:2019:204; [2019] 4 C.M.L.R. 26 at [25]–[27].

[8] See F. Marcos, "Competition Law Private Litigation in the Spanish Courts (1999-2012)" (2013) 182 G.C.L.R. 167–208.

[9] Commercial judges and commercial courts are competent to decide damages claims based on infringements of EU competition rules (TFEU arts 101 and 102) or domestic competition rules (arts 1 or 2 of the DCA). See art.86 ter.2.f) of Basic Act of Judicial Power as amended by (Official State Gazette 157 of 2 July 1985) and Additional provision 1 of DCA 2007.

[10] Civil Procedure Act 1/2000 of 7/1 (CPA, Official Gazette 7 of 8 January 2000). But see preliminary ruling lodged by Madrid commercial court 2 of 23 December 2019 (PO550/18, *RH v AB Volvo* (C-30/20)) on the interpretation of art.7(2) of Regulation EU/1215/2012 (OJUE L351 of 20 December 2012) on this regard.

[11] See art.394 of CPA (with a cap of one-third of the total value of the action). If there is a partial rejection/award of the claim, each party will bear its own costs and the common costs will be divided equally.

[12] See Supreme Court Judgment (Civil Ch.) of 4 November 2008, ES:TS:2008:6610, overriding the bar association's prohibition of contingency fees for violating art.101 TFEU.

[13] See S. Saiz, "Los fondos de litigios se hacen fuertes en España" *Expansión* 21 January 2020.

[14] See F. Marcos, "Spain" in B. J. Rodger, M. S. Ferro and F. Marcos (dirs), *The EU Antitrust Damages Directive: Transposition across the Member States* (OUP, 2019), p.331 and P. Callol and J. Manzarbeitia, "Antitrust damages litigation- key aspects of cartel damages in Spain" (2017) 38 ECLR 374.

[15] See EUCJ judgment of 28 March 2019, *Cogeco Communications Inc v Sport TV Portugal* (C-637/17) EU:C:2019:263; [2020] 5 C.M.L.R. 2 and the preliminary ruling (*AB Volvo & DAF Trucks*(C-267/20)) lodged by Provincial Court of Leon (s.1) on 12 June 2020, ES:APLE:2020:291A. On the later, see F. Marcos, "De nuevo sobre la prescripción de las acciones de daños causados por el cártel de los camiones" *Almacén de Derecho* 27 August 2020.

[16] See Marcos, "Competition Law Private Litigation in the Spanish Courts (1999-2012)" (2013) 182 G.C.L.R. 170 (94%).

The "fuel retail" claims are best considered as hybrid or mixed follow-on and stand-alone cases

> "because they do not technically qualify as follow-on cases because the facts at issue are essentially different, but where the parties heavily rely upon previous decisions of the Spanish Competition Authority (NCA)—or less frequently, the European Commission (EC) which seemingly have played a decisive role in triggering the action".[17]

Given numerous complex legal issues raised in these procedures, Spanish courts have lodged seven preliminary rulings before the European court of Justice (EUCJ) concerning the scope of application of art.101.1 of the Treaty on the Functioning of the European Union (TFEU) to agency contracts,[18] the requirements of the Vertical Restraints Block Exemption Regulation (EU regulations 1984/83 and 2790/1999),[19] the application in that context of the de minimis rule[20] and, lately, on the effects in private litigation of commitment decisions of the EU Commission.[21]

At the end, most of these claims before the Spanish Courts have been dismissed (80 per cent of suits were rejected); and in the few cases in which the courts have accepted them, no compensatory damages were awarded.[22] However, the retail fuel saga has been lately reignited following some 2015 Supreme Court judgments that changed the doctrine priorly held on the effects of infringements of art.101.1 TFEU in certain clauses in the contract (considering it void as a whole if the anti-competitive clauses were an essential part of it).[23] Additionally, a new stream of follow-on actions—with the intervention of the litigation fund Therium[24]—has started in the wake of the National Competition Commission (NCC) 2009 decision declaring the infringement by the petrol suppliers REPSOL, CEPSA and BP of art.101.1 TFEU through RPM.[25] These new cases have prompted the lodging of a new preliminary ruling before the EUCJ on the binding effects of national competition authorities' decisions before Directive 2014/104/UE.[26]

Abuses of dominance

Until recently, a few of the follow-on actions have related to damages caused by abuses of dominance in the telecommunications and energy sectors and in the commercialisation of broadcasting football rights.

Telecommunications

Two of the successful damages claims to date involved claims against the former State Owned Enterprise (SOE) Telefónica for the harm it caused by unilateral abusive conduct in certain telecommunications-related markets.

The first was a follow-on damages claim by 3C Communication Services for an abuse in the payphone services market that had been sanctioned by the Defence Competition Tribunal (DCT).[27] The Madrid Provincial Court (s.25) confirmed the compensation for the harm caused by Telefónica's denial/delay in the supply of leased phone lines.[28]

The second was a claim by Conduit Europe seeking compensation for harm caused by Telefónica's abuse in the telephone directory enquiry services market. This market had been open to competition in 2003 but Telefónica had not complied with the liberalisation measures and it did not provide Conduit—a new entrant in the market—with the subscriber data necessary to get in the market.[29] The Madrid Provincial Court endorsed the calculation of the direct losses claimed by Conduit (€639,000) but dismissed compensation for lost profits.[30]

There had been other set of damages claims against Telefónica, also to seek compensation for harm caused by abuse of dominance, mainly in follow-on claims.

[17] See E. Ameye, "Spain" in I.K. Gotts (ed.), *The Private Enforcement Competition Review*, 9 edn (2016), pp.350-351.
[18] On the coverage of agency contracts by art.101 there was also a preliminary ruling requested by the Supreme Court (deciding on appeal against a resolution by the DCT of 1 April 1998), r.280/97 *CEPSA*), see EUCJ judgment of 14 December 2006 (*Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos SA* (C-217/05) EU:C:2006:784; [2007] 4 C.M.L.R. 5; [2007] C.E.C. 143).
[19] See EUCJ judgments of 11 September 2008 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* (C-279/06) EU:C:2008:485; [2008] 5 C.M.L.R. 19, and of 2 April 2009 *Pedro IV Servicios SL v Total Espana SA* (C-260/07) EU:C:2009:215; [2009] 5 C.M.L.R. 1; [2009] C.E.C. 973 and EUCJ Order (10th Ch.) of 27 March 2014 (*Bright Service SA v REPSOL* (C-142/13) EU:C:2014:204).
[20] Connected to the two judgments cited in the prior note, see EUCJ Order (7th Ch) of 3 September 2008 (*Lubricarga SL v GALP* (C-506/07) EU:C:2009:504),and EUCJ Order (10th Ch.) of 4 December 2014 (*E.s.Pozuelo 4 v GALP (C-384/13) EU:C:2014:2425*). See F. Wijckmans, "Pozuelo4: de minimis treatment of exclusive purchase (single branding) obligations" (2015) 6 JECLAP 413–415.
[21] Regarding Commission Decision 2006/446/EC of 12 April 2006 (COMP/B-1/38.348—Repsol CPP, OJEU L178 of 30 June 2006), confirmed by Order of EUGC (4th Ch.) of 14 November 2018, *Transportes Evaristo Molina SA v Commission* (T-45/08) EU:T:2008:499, upheld by EUCJ judgment (7th Ch) of 11 November 20 November 2010 *Transportes Evaristo Molina v Commission* (C-36/09 P) EU:C:2010:670, see EUCJ judgment (3rd Ch.) of 23 November 2017, *Gasorba SL v REPSOL Comercial de Productos Petroliferos SA* (C-547/16) EU:C:2017:891; [2018] 4 C.M.L.R. 7. On this case See C. Fratea, "Commitment decisions and private actions for damages in EU competition law in light of the Gasorba judgement: a new opening from the Court of Justice of the European Union?" (2018) 39 ECLR 501–504 and S. Makris and A. Ruiz, "Commitments and network governance in EU antitrust: Gasorba" (2018) 55 CMLR 1–29. The Spanish Supreme Court decided the case by its judgment of 7 February 2018 ES:TS:2018:297.
[22] See Marcos, "Competition Law Private Litigation in the Spanish Courts (1999-2012)" (2013) 182 G.C.L.R. 171.
[23] Judgments of 12 Janurary 2015, *Ribeira Baixa & Ribeira Alta v REPSOL*, ES:TS:2015:277; 31 March 2015, *E.S. Pineda del Mar & Olma v REPSOL*, ES:TS:2015:1553 and 13 May 2015, *Promotores Internacional & Pablo Rada Combustibles v REPSOL*, ES:TS:2015:2216.
[24] See R. Esteller, "El fondo Therium exigirá a Repsol, Cepsa y BP daños por fijar los precios" *El Economista* 19 July 2016.
[25] NCC resolution of 30 July 2009 (652/07 *Repsol/CEPSA/BP*).
[26] See request for a preliminary ruling from Commercial Court 2 of Madrid (Spain) lodged on 26 August 2019, *ZA et al v Repsol Comercial de Productos Petrolíferos SA* (C-716/19), the order of the court is of 29 July 2019 (ES:JMM:2019:88A). It was rejected by Order the EUCJ (7th Ch.) of 28 October 2020 (EU:C:2929:870).
[27] DCT resolution of 1 February 1995 (350/94 *Teléfonos aeropuertos*).
[28] Judgment of Provincial court of Madrid (s.25) of 8 May 2007, *3C Telecommunications v Telefónica*, ES:APM:2007:6002. The final amount of the award was settled by the parties.
[29] The duty to do so had been priorly declared by the National Telecommunications Commission.
[30] Judgment of Provincial Court of Madrid (s.28) of 25 May 2006, *Conduit Europe v Telefónica*, ES:APM:2006:6773. See the account of the case by Conduit's lawyer P. Hitchings, "The Conduit case" in *Derecho de la competencia europeo y español. Curso de iniciación, vol. VII*, 2009, pp.157–176.

Vodafone (Airtel) sought €670 million as compensation for the exclusionary practices of Telefónica—as the incumbent in the mobile phone market—to hinder Airtel's entry (a conduct that had been sanctioned before by the DCT[31]). The claim was apparently settled out of court.

Also, a €458 million collective damages claim was filed by the consumers' association Ausbanc to compensate for harm suffered by users in the retail broadband services market because of price squeezing by Telefónica for which it had been fined by the European Commission.[32] The action was rejected at an early stage on procedural grounds (lack of standing of Ausbanc).[33]

Energy

There have been several successful damages claims in the energy industry; in particular in electricity commercialisation markets. Indeed, some of the very first antitrust private actions decided by the Spanish courts were claims following DCT's infringing decisions for abuse of dominance in the electricity markets.[34] Also, in a stand-alone case, Endesa was ordered to pay €1 million in damages for the harm caused by an anticompetitive refusal to deal.[35]

Moreover, several follow-on claims were pursued by a new entrant in the electricity retail market (Céntrica) against the incumbent operators for an abuse of dominance by electricity wholesalers and producers, in respect of which they had already been fined by the NCC.[36] Céntrica claimed compensation for the harm suffered in its entry to the electricity retail market caused by the incumbents' refusal to provide access to some information needed to intervene in the market (information system on the supply points). Some of these claims have been dismissed on various grounds,[37] but some others have been accepted.[38]

Football broadcasting rights

Other court rulings have been pronounced in damages claims relating to abuses of dominance (exclusivities or excessive pricing) in the sale of broadcasting football rights. After the DCT fined the Spanish National Football League in 1993, Antena 3 TV claimed damages that were initially awarded by the court of instance (€25.5 million on profits lost in advertising income) but that were ultimately rejected by the appeals court (deeming them "profit dreams").[39]

More recently, there has been a successful stand-alone claim by cable TV channel, Cableeuropa, where the court has awarded €30 million plus interest in compensation for the excessive prices charged by the owner of broadcasting rights.[40]

Cartels

The Spanish experience regarding damages claims in cartel cases is rather limited. Whereas stand-alone actions are feasible (in some other types of infringement: vertical restraints and abuse of dominance), these are hardly viable in cartel cases, where for practical reasons the prior declaration of an infringement by the competition authorities is needed (i.e., they're always follow-on). Indeed, until the adoption of the Defence Competition Act in 2007, follow-on private claims could only be filed once that decision was confirmed by courts, and this could delay their initiation for around 10 years.

The leading case: industrial sugar cartel

The 1995 sugar cartel prompted the first follow-on cartel damages' claim to reach the Supreme Court.[41] The Supreme Court rulings in this case clarified some aspects regarding private damages' claims, for instance in relation to the binding effects of decisions by public enforcers, legal grounds for liability, harm quantification, passing-on defence and interests.[42] Damages awards were based on

[31] DCT resolution of 26 February 1999 (413/97 *Airtel/Telefónica*). See R. Muñoz, "Vodafone exige a Telefónica 670 millones por trabas a la competencia" *El País* 15 September 2008.
[32] Decision of 4 July 2008 (COMP/38.784) *Wanadoo España v Telefónica*) declaring Telefónica infringed art.102 TFEU through price squeezing in the retail broadband services market, Confirmed by EUGC judgment (8th Chamber) of 29 March 2012 *Telefónica v European Commission* (T-336/07) EU:T:2012:172; [2012] 5 C.M.L.R. 20 and EUCJ (5th Chamber) of 10 July 2014 (C-295/12P) EU:C:2014:2062; [2014] 5 C.M.L.R. 18.
[33] See Order of Provincial Court of Madrid s.28 of 30 September 2014, *Ausbanc v Telefónica ES:APM:2013:2461A*. *Ausbanc* lost its legal standing as a "widely representative" association after being excluded from the Consumers and Users Council because it performed activities that the law banned to consumer associations (commercial advertising), see judgment of National Court (s.4) of 6 October 2010, *Ausbanc* ES:AN:2010:4765.
[34] In the market for retail electricity in San Pau (Girona), see DCT resolution of 5 May 1999 (431/98 *Eléctrica Curós*), and judgment of provincial court of Girona of 16 April 2002 (ES:APGI:2002:633, €66,000), and in the market for supply electricity in Caldas de Mont Bui (See DCT resolution of 19 February 1999 (473/98 *Eléctrica Caldense*) and judgment of provincial court of Barcelona (s.15) of 1 December 2001 (ES:APB:2011:14053, €3,136.326.99).
[35] See Supreme Court Judgment of 12 November 2012 (ES:TS:2012:7944).
[36] See NCC resolutions of 2 April 2009 (641/08 *Céntrica/ENDESA*); of 2 April 2009 (642/08 *Céntrica/Unión Fenosa*); of 2 April 2009 (644/8 Céntrica/Iberdrola) and of 29 April 2009 (645/8 *Céntrica/Hidrocantábrico*).
[37] See Supreme Court judgments of 6 July 2017 *Centrica v Iberdrola* (ES:TS:2017:2792, statute of limitations) and before 4 September 2013 (ES:TS:2013:4739, lack of causation).
[38] See Supreme Court Judgment of 4 June 2014, *Céntrica v ENDESA* (ES:TS:2014:294, even profit loss awarded) and Provincial Court of Madrid (s.11) judgment of 29 July 2015, *Céntrica v Unión Fenosa* (ES:APM:2015:13792)
[39] See judgment of commercial court 4 of Madrid of 7 June 2005, *Antena 3 de TV SA v LNFP*, ES:JPI:2005:9) and judgment of provincial court of Madrid (s.25bis) of 18 December 2006 (ES:APM:2006:18320).
[40] Judgment of first instance court 4 of Madrid of 4 March 2010, *Cableeuropa SAU v Sogecable SA & Audiovisual Sport SL* ES:JMM:2010:158. On a related matter Mediaproducción SLU, Audiovisual Sport and Sogecable SA were released from the anticompetitive agreement not to compete among themselves in the market for acquisition of broadcasting rights it had with *Audiovisual Sport SL*, which had already been declared null and void by NCC resolution of 14 April 2010 (S/6/7, *AVS, Mediapro, Sogecable y Clubs de Fútbol de 1ª y 2ª División*), see judgment of Supreme Court 9 January 2015 *AVS & Sogecable v Mediapro* (ES:TS:2015:191) (paras 13 and 16).
[41] See judgments of 8 June 2012, *Galletas Guyón v ACOR* ES:TS:2012:5462 and of 7 November 2013, Nestlé v Ebro ES:TS:2013:5819. It was a follow-on claim to a decision by the Defence Competition Tribunal (DCT) in 1999 that fined sugar producers for a cartel that lasted one year (see DCT resolution of 15 April 1999 *Sugar* 426/98).
[42] See F. Marcos, "Damages' claims in the Spanish Sugar cartel case" (2015) 3 *Journal of Antitrust Enforcement* 1-21.

the estimated costs of the cartelised firms, by calculating the share of the price increase which was not caused by any increase in costs.[43]

Follow-on claims in cartel cases

The institutional structure for the enforcement of competition law in Spain was modernised in 2007, with the creation of the National Competition Commission (NCC).[44] A leniency program was introduced and the powers of inspection of the NCC were strengthened.[45] These are important factors in explaining the increase in the number of cartels found and sanctioned by the NCC thereafter. Not only did the number of cartels uncovered grow significantly after 2007, nearly trebling in comparison with the prior experience of the DCT, but the cartels that were uncovered had a broader scope and were of longer duration.[46]

In addition, NCC decisions further eased follow-on claims by providing ample evidence and data on the effects that the declared infringements had in the market, furnishing valuable supportive information to facilitate claims by alleged victims (particularly to identify and quantify the harm).

Nevertheless, lack of public records on damages actions registered with the competent commercial courts makes it difficult to know about their existence, as eventually they are made public only once a judgment is issued.[47] For example, following the complaint by a basketball team (Club Baloncesto Tizona S.A.D.), the Spanish Association of Basketball Clubs (ACB) was found to have infringed competition law through the imposition of disproportionate, inequitable and discriminatory economic and administrative conditions upon those teams that had earned promotion to League ACB on sporting merit.[48] The complainant announced it would file damages claims against the ACB,[49] and apparently other teams that might have been harmed have followed suit.[50]

Paper envelopes

A paper envelopes' cartel that operated in the Spanish market was fined €44 million by the NCC.[51] A connected infringement had simultaneously been uncovered by the European Commission and the Portuguese Competition Authority.[52]. It was a market allocation and bid-rigging cartel from 1977 to 2010, though occasionally the cartelists also fixed prices. Accordingly, damages quantification was not as clear-cut an exercise as when it occurs in pure price fixing conspiracies.[53]

To date, at least 11 follow-on actions have been filed in court of which 10 have been successful on appeal.[54] The provincial courts of Madrid and Barcelona vary in their calculation of the overcharge: both appeal courts agreed that the cartel caused harm to the claimants, but came to different conclusions regarding the amount of the overcharge (20 per cent in Barcelona, 9.4 per cent in Madrid) [55]. It is expected that the Supreme Court will finally settle the matter in these cases, but until that happens one could anticipate that the success of victims in the claims filed so far may incentivise new claims being brought to court.

Judgment (section), date, ECLI	**Overcharge**	**Claimant**
Provincial court of Barcelona s.15, 1 January 2020 ES:APB:2020:59	20%	Cortefiel
Provincial Court of Barcelona s.15, 10 January 2020 ES:APB:2020:58	20%	Misiones Salesianas
Provincial Court of Barcelona s.15, 10 January 2020 ES:APB:2020:201	20%	Grupo Planeta
Provincial Court of Barcelona s.15, 13 January 2020 ES:APB:2020:60	20%	CIFDSA
Provincial Court of Barcelona s.15, 13 January 2020 ES:APB:2020:186	20%	Mutua Madrileña
Provincial Court of Barcelona s.15, 13 January 2020 ES:APB:2020:185	20%	Manos Unidas

[43] See J. Delgado and E. Pérez-Asenjo, "Economic evidence in Private-enforcement competition law in Spain" (2011) 32 ECLR 509.
[44] Later transformed into the National Markets & Competition Commission (NMCC) by Act 3/13 of 4 June 2013 creating the NMCC (Official State Gazette 154 of 5 June 2013).
[45] On the relative success of the Spanish leniency program see J. Maillo, "Evaluación y retos del progama de clemencia español" in J. Guillén (dir), *Estudios sobre la potestad sancionadora en el Derecho de la Competencia* (2015) pp.219–245, 221–222. Surprisingly, there is wide divergence with the situation in Portugal, see M. S. Ferro and E. Ameye, "Leniency in the Iberian Peninsula: Two Worlds Apart" (2016) 12 Competition L. Rev. 95–114.
[46] See J.R. Borrell, J.L. Jiménez and J.M. Ordóñez-de-Haro, "The leniency programme: obstacles on the way to collude" (2015) 3 *Journal of Antitrust Enforcement* 149–172 and "Análisis forense de los cárteles descubiertos en España" (2015) 145 *Papeles de Economía Española* 82–103.
[47] See, for example, F. Marcos and A. Robles, "¿Habrá reclamaciones de daños por el cartel de las desmotadoras de algodón?" *Osservatorio Antitrust* 20 March 2014 (speculating on potential follow on damages claims to NCC resolution 19 December 2013 S/0378/11 *Desmotadoras de Algodón*, although see judgment of Provincial Court of Sevilla (s.8) of 25 July 2012 ES:APSE:2012:2542). Likewise there is information by several law firms regarding potential claims in the electric cables' cartel that the NMCC sanctioned in 2017 (NMCC resolution of 21 November 2017 *Cables BT/MT* S/DC/562/15).
[48] NMCC resolution of 11 April 2017, *S/DC/558/15 ACB*.
[49] See F. Marcos, "Baloncesto y libre competencia: la multa y la penitencia de la Liga ACB" *Almacén de Derecho* 10 May 2017 (with a list of the teams that could allegedly claim damages).
[50] See, for example, "El MoraBanc Andorra demanda a la ACB por el canon de ascenso" *As* 2 August 2019.
[51] NCC of 25 March 2013, S/0316/10 *Sobres de Papel*. The NCC decision was upheld by the Supreme Court on the merits, only modifying the amount of the fine. The cartel was uncovered by a leniency application of ADVEO, and it even involved a separate export cartel (NCC resolution of 15 October 2012, S/0318/10 *Exportación de sobres*).
[52] See Decision of the European Commission of 10 December 2014(AT.39780 *Envelopes*) and Decisions of the Portuguese Competition Authority of 29 March 2016 (PRC/2011/10, transaction with *Antalis*) and of 16 November 2016 (PRC/2011/10).
[53] See J. M. Connor and D. P. Werner, "New Research on the effectiveness of bidding rings: implications for competition policies" *CPI* April 2019, 6.
[54] Commenting the Madrid and Barcelona first instance judgments, see J.N. Otegui, "Spain—Recent developments in competition damages claims: What once was just a possibility, is now a reality" (2019) 40 ECLR 41–43 and "Developments in competition damages claims in Spain, take II: now we know Barcelona is the place to go …" (2019) 40 ECLR 202.
[55] The last judgment on damages' claims on the paper envelopes' cartel was decided by commercial court 9 of Madrid on 13 March 2020, *IFEMA v ADVEO* ES:JMM:2020:1552, following the criteria established by the Madrid Provincial Court in its two judgments on the case, setting the overcharge at 9.4% (€246,000).

Judgment (section), date, ECLI	Overcharge	Claimant
Provincial Court of Barcelona s.15, 13 January 2020 ES:APB:2020:184	20%	Caixa Ontiyent
Provincial Court of Barcelona s.15, 13 January 2020 ES:APB:2020:698	20%	Bankoa
Provincial court of Madrid s.28, 3 February 2020 ES:APM:2020:1	9.4%	Obras Misionales Pontificias
Provincial court of Madrid s.28, 3 February 2020 ES:APM:2020:2	9.4%	Cámara de Comercio

Decennial insurance

In 2011 the NCC hit on a cartel in the real estate insurance market (decennial insurance). This insurance was made mandatory by law in 2000. The cartel involved three insurers and three reinsurers. The decision of the NCC even made a rough estimation of the harm that the cartel had caused during the six years it lasted (€282 million).[56] Upon judicial review, the amount of the total fine was reduced in half (from €120.7 million to €61.47 million) and the decision was partially annulled in relation to two of the companies (MAPFRE and Münchener).[57]

Initially, building construction companies were those assumed to be directly harmed by the cartel, which allegedly caused an increase in the price of insurance,[58] but the first successful damages action was filed by a rival insurer, obtaining €3 million, for the boycott and its exclusion from the market.[59] However, there seem to be more pending claims in court.[60]

Car manufacturers and car distribution

Two leniency applications by Seat SA exposed a seam of anticompetitive practices in the Spanish auto distribution industry. Firstly, a global exchange of information involving 21 manufacturers and two consulting firms that operated from 2003-2014 was sanctioned by the National Markets and Competition Commission (NMCC) with fines totalling €131 million.[61] Secondly, a hub-spoke cartel in the distribution of cars Audi/Seat/VW was uncovered and circa 100 distributors were sanctioned by the NMCC.[62] Thirdly, information found in the inspections conducted at the premises of a consulting firm who operated as "mystery" shopper (ANT Servicalidad SL) in charge of controlling compliance with the discounts and commercial campaigns set by the cartel led to the discovery of six additional cartels in the distribution of cars involving Chevrolet,[63] Hyundai,[64] Land Rover,[65] Opel,[66] Toyota[67] and Volvo.[68]

After those decisions were published, follow-on damages claims against the infringers were initiated by many of those who bought cars of those brands during the infringement period. Initially there was a major collective claim organised by Organización de consumidores y Usuarios (OCU), which allegedly gathered the interest of 160,000 victims.[69] Then, several individual claims were brought before different courts. Almost all of them have been dismissed, mainly due to lack of proof of harm,[70] but also because of lack of standing of the claimant,[71]the limitation period had expired,[72] or because the relevant NMCC decision had been appealed in court.[73]

[56] See F. Marcos, "The Spanish Property Insurance Cartel" (2012) 18 *Connecticut Insurance Law Journal* 9–101.
[57] See F. Marcos, "Lecciones de la revisión judicial del cártel del seguro decenal" (2016) 36 *Actas de Derecho Industrial* 173–196 .
[58] F. Marcos, "Why there might be not many damage claims arising from the Spanish Property Insurance Cartel?" in L.A. Velasco et al (dir.), *Private enforcement of Competition Law* (2011), pp.303–335.
[59] See judgment of commercial court 12 of Madrid of 9 May 2014 (ES:JMM:2014:3797), confirmed on appeal by judgment of the provincial court of Madrid (s.28) of 3 July 2017 (ES:APM:2017:9034). Recently, the Supreme Court has rejected the final appeal on this case, see M. Moreno, "El Supremo condena a Caser, Scor y Asefa por limitar la competencia" *Cinco días* 20 May 2020. I commented the case in "Indemnización de daños y perjuicios por boicot a raíz cártel del seguro de daños decenal (SDD): Notas a propósito de la sentencia del juzgado mercantil nº 12 de Madrid de 9 de mayo de 2014 (MUSAAT v. ASEFA, CASER y SCOR)" (2015) 16 RDCD.
[60] Indeed the first favorable judgment has been published recently, see judgment of 9 June 2020 (*Realia v ASEFA & SCOR*, PO537/17), awarding €2,651,579.82 on damages plus interest, and my comment on the case "Un 'paraguas roto' y el espejismo de los daños causados por el cártel del seguro decenal" *Almacén de Derecho* 19 June 2020 (critically assessing the grounds of the court's decision).
[61] NMCC resolution of 23 July 2015 (S/482/13 *Fabricantes de Automóviles*). This resolution was confirmed by the National court (with the exception of Mazda's involvement in the infringement), see "La justicia rechaza 17 recursos de los fabricantes de coches y confirma las multas por cartel" *Cinco Días* 13 January 2020.
[62] NMCC resolution of 28 May 2015 (S/471/13 *Concesionarios Audi/Seat/VW*).
[63] NMCC resolution of 28 April 2015 (S/DC/505/12 *Concesionarios Chevrolet*).
[64] NMCC resolution of 5 March 2015 (S/DC/488/13 *Concesionarios Hyundai*).
[65] NMCC resolution of 5 March 2015 (S/DC/487/13 *Concesionarios Land Rover*).
[66] NMCC resolution of 5 March 2015 (S/DC/489/13 *Concesionarios Opel*).
[67] NMCC resolution of 5 March 2015 (S/0486/13 *Concesionarios Toyota*).
[68] NMCC resolution of 12 July 2016 (S/0506/14 *Concesionarios Volvo*).
[69] See OCU, "Concesionarios de coches: Reclama contra los precios pactados", 15 September 2015 and E. Paniagua, "Demanda colectiva contra el cártel de los concesionarios" *El Mundo* 29 October 2015.
[70] See "¿Cómo reclamar si fui víctima del cártel de los coches?" *Cinco Días* 12 June 2015 (identifying the harm in the inferior discounts applied in car acquisitions). Judgments of Commercial Court of Donostia 1 of 11 July 2019, *Carlos Alberto & Verónica v.Menai SL* ES:JMSS:2019:1014; *Ricardo et al v Vascongada de Automóviles SL* ES:JMSS:2019:1013; *Pilar & Mari Luz v Autowag SL*, ES:JMSS:2019:1012 and also of commercial court Gijon 3 of 9 March 2020, *Pedro Enrique v Tartiere Auto SL* ES:JMO:2020:729, rejected the claim for lack of harm in the acquisition of a VW Polo 2.0 TDI 143 CV, as the alleged overcharge (€2,000) would have meant that no margin was made by the retailers (Legal Ground 3. Id. Judgments of commercial court Gijon 3 of 9 March 2020. *Emiliano v Tartiere Auto SL* ES:JMO:2020:728 Audi A3 2.0 TDI 143CV (Legal Ground 3). The only successful follow-on claim to NMCC resolution of 28 May 2015 (S/DC/471/13 *Concesionarios Audi/Seat/VW*) is Judgment of Commercial Court of Oviedo 1 of 18 February 2020, *Micaela v Tartiere Auto SL* ES:JMO:2020:569, in which harm is presumed and the overcharge estimated to be between 5–7.5% (Legal Ground 3): €1,398.24 (on the acquisition of a VW Bettle Design 1.6 TDI 150 CV, net price €19,001.77)
[71] Following NMCC resolution of 5 March 2015 (S/489/13 *Concesionarios OPEL*), judgment of Commercial Court of Madrid 12 of 24 September 2019, *Baltasar v Talleres Prizan SA* (ES:JMM:2019:4227).
[72] See Judgment of Commercial Court of Oviedo 1, *Roberto v. Tartiere Auto SL* ES:JMO:2020:1539 of 18 May 2020.
[73] Following NMCC of 23 July 2015 (S/0482/13 *Fabricantes de automóviles*), judgment of Commercial Court of Bilbao 1 of 9 July 2019, *Jose Daniel v Alzaga Motor SA* (ES:JMBI:2019:1146); *Erica v Alluitz Motor SL* ES:JMBI:2019:1047 and of 14 March 2018, *Samuel v VW Group España Distribución SA* ES:JMBI:2018:1278).

School books publishers

A school book cartel organised by the main association of school textbook publishers (Asociación Nacional de Editores de Libros y Materiales de Enseñanza-ANELE) and 34 member publishing firms was sanctioned by the NMCC in 2019 with fines totalling €33.88 million.[74] The infringement involved the fixing of prices and other commercial conditions (through the Code of Conduct of the association) and delaying and making more expensive the use of digital books (from 2012-2018).

News reports refer to a collective claim initiated by the Madrid Federation of Associations of student's parents Francisco Giner de Los Rios,[75] and the information publicly available to join the claim says the cartel overcharge would be not less than 32 per cent.[76]

Railway electrification and electromechanics

A leniency application by Alstom led to the uncovering of three bid-rigging cartels in the public procurement of the electrification and electromechanics infrastructure of conventional and high-speed railway managed by the State Owned ADIF (Administrator of Railway Infrastructures) in different time periods ranging from May 2002 to November 2016.[77]

Fifteen companies and 14 directors received fines of over €118 million. Not long after the NMCC decision was made public, ADIF announced the filing of claims to obtain compensation for the harm caused by these cartels.[78] In the meantime, it has been reported that ADIF has decided to retain 10 per cent of the price on the pending contracts with the cartelists,[79] and it has introduced in future contracts penalty clauses with punitive damages up to 10 per cent of the price of contract in case of fraud or anticompetitive behaviour by its suppliers.[80]

Milk procurement

Following a complaint by an individual farmer (Sociedad Agraria de Transformación San Antón), a milk procurement cartel involving eight dairy firms was discovered by the NMCC in 2015.[81] Two dairy producers' associations also collaborated in the infringement which lasted for 13 years (2000–2013), and which resulted in a fine of €88.2 million. Although the NMCC decision was later annulled following some procedural shortcomings, the cartel was re-sanctioned in 2019.[82]

A damages action in this case was filed early on 2016[83] following the first decision of the NMCC, but the impact the public enforcement fiasco may have on these claims remains, as yet, unclear.

This was a buyer cartel, which reduced the price farmers received for raw milk (estimations of the harm range from €0.01 to €0.03 per litre of milk). Interest by potential claimants was revived following the second decision adopted by the NMCC in 2019, with the press reporting that several claims are being organised, and litigation funds providing financial support to some of them.[84]

Trucks' manufacturers

Although a relatively recent "case", which is currently being litigated in the commercial courts across the country and elsewhere across the EU, the trucks' manufacturers cartel provides the best example of the *status quaestionis* of antitrust damages claims in Spain. As is widely known, it involves litigation against the six trucks manufacturers that were involved in a cartel that monopolised the medium and heavy trucks European market for 14 years (1997–2011). The cartel was uncovered by a leniency application by MAN, and led to heavy fines imposed by the European Commission on DAF, Daimler, IVECO and Renault/Volvo, SCANIA (€3,810 million).[85]

Together with Germany, Spain is one of the jurisdictions in which most claims have been filed in the courts to date, and there have already been a considerable number of rulings by the Spanish courts. Indeed, the number of judgments in trucks-related litigation (including appeal judgments) is around 750, making it the most widely litigated private antitrust damages case in Spain to date. Most of the judgments have ruled in favour of the claimants (87 per cent of suits), although there is considerable divergence among the courts' rulings regarding the level of the overcharge and, consequently, of the amount of damages awarded.[86]

Conclusion

Although private enforcement of competition law has long been possible in Spain, there has been a recent upsurge in the volume of antitrust damages claims in the

[74] NMCC resolution of 30 May 2019 (*ANELE* S/DC/594/16).
[75] See "Las asociaciones de padres demandarán a los editores por pactar los precios de los libros de texto" *ABC* 7/10/19 and O. R. Sanmartín, "Las asociaciones de padres de alumnos demandarán a los editores por los precios de los libros de texto" *El Mundo* 7 October 2019 (overcharge of €214 million per year, overall €1,300 million).
[76] See FAPA Francisco Giner de los Ríos, *Demanda a las editoriales de libros de texto*. See also *http://cartellibrosdetexto.es/* [Accessed 26 January 2021].
[77] NMCC resolution of 14 March 2019 S/DC/598/16 *Electrificación y Electromecámicas Ferroviarias*.
[78] See PR 1/4/19 "Adif y Adif AV reclamarán daños u perjuicios a las empresas sancionadas" and "Adif pedirá daños y perjuicios a las empresas multadas por la CNMC por cartel" *Expansión* 2 April 2019.
[79] See E. G. Sevillano, "Adif castiga a las empresas del cartel del AVE y les retiene un 10% en sus contratos" *El País* 15 August 2019.
[80] See "Adif multará a contratistas que cometan infracciones para blindarse ante nuevos cárteles" *Europapress* 16 May 2019.
[81] See NMCC resolution of 26 February 2015 S/425/12 *Industrias Lácteas 2*.
[82] See NMCC resolution of 11 July 2019 S/425/12 *Industrias Lácteas 2* (amount of fine reduced to €80.6 million).
[83] See "Juzgan en Granada a cuatro lácteas por posible 'cártel' para pactar precios" *La Vanguardia* 28 September 2018 (€8.6 million claim by SAT San Antón).
[84] See "Hausfeld Pairs Up With Madrid Firm To Target Milk Cartel" *CPI* 9 June 2020.
[85] See Decisions of 19 July 2016 (AT.39824—*Trucks*) and 27 September 2017 (AT.39824 -*Trucks*).
[86] See F. Marcos, "Primeras sentencias de las Audiencias provinciales sobre los daños causados por el cártel de fabricantes de camiones" (2020) 26 RCDC 26.

courts' dockets. The uncovering of several cartels by both the European Commission and the Spanish competition authorities has prompted a series of follow-on damages actions.

Until now, the lawsuits have been decided within the framework of traditional tort law, which has been construed by the Spanish courts in a way to accommodate the particular issues characterising these actions. Supreme Court opinions on the damages claims in the sugar cartel have become influential for the lower courts at least until the new rules implementing Directive 2014/104/EU are applicable. There is ongoing controversy regarding the transitory regime of the Directive which is a complicating factor for the cases pending in court; the substantive rules of the Directive will be fully applicable for future claims, facilitating the compensation of those harmed by anticompetitive behaviour.